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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-369

FIRCH BAKING COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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October 5, 1973

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Statement

Throughout the proceedings within the N.L.R.B. the only issue considered or decided was whether petitioner had unilaterally improved the terms of employment before a "bargaining impasse" had occurred. The Board's complaint charged petitioner with unilaterally increasing wages and other benefits in the absence of a bargaining impasse (A7a). The trial examiner stated that "the only issue raised" is whether petitioner in instituting changes in wages and other conditions of employment, violated Section 8(a)(5) and (1) of the Act (2a). He went on to state:

> "The resolution of this question turns upon whether the parties had reached an impasse in the negotiations at the time the action was taken". (2a)

The only violation found by the trial examiner was the following:

> "By putting into effect on January 2, 1972, the economic proposals previously submitted to the aforesaid union without bargaining collectively with it concerning these proposals to an impasse, the Respondent [petitioner] has engaged in an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act". (25a)

As to the propriety of petitioner's direct communications with its employees, the trial examiner stated:

> "Because of the narrow issue presented by the complaint in this case I do not reach this question". (5a, n.1)

As to the petitioner's position on the issue of "on-the-clock" versus "off-the-clock" bargaining, which kept the Union from the bargaining table for some time until petitioner's economic proposal was sent to it by mail, the trial examiner stated:

> "Whether this is a lawful bargaining strategy under the circumstances of the case is, of course, not before me because this issue was not raised by the complaint". (22a, n.2)

The trial examiner's recommended order, which was affirmed by the Board and would be enforced by the Court of Appeals without change, does not prohibit petitioner from making promises to, or otherwise communicating with, its employees, but does prohibit petitioner from:

> "changing the wages, hours or other terms and conditions of employment of the employees in the appropriate unit without bargaining collectively with the aforesaid union to an impasse about such changes". (26a)

The Board affirmed all of the rulings, findings and conclusions of the trial examiner (30a). The Board also stated:

> "[W]e agree with the Administrative Law Judge [trial examiner] that the only question to be decided here is whether an impasse had ocurred at the time Respondent [petitioner] implemented its 'fair, firm offer' without the Union's consent". (30a, n.2)

Argument

The question presented for review in this Court—whether an employer may put into effect improved terms and conditions of employment that have been offered to and rejected by the Union even though an impasse in the bargaining has not occurred—is squarely presented on this record. That issue is the only substantial legal issue considered or decided by the trial examiner and the Board. The issue is squarely raised by the order that the Court of Appeals has decided to enforce.

There was no unilateral change beyond those changes specified in petitioner's five page "fair firm offer" of December 27, 1971, described in the Brief in Opposition as an "outline". To the contrary it was stipulated on the record that what was put into effect unilaterally on January 2, 1972 was "identical" to the "fair, firm offer" that had previously been offered to the Union (A. 56a).

The Board's statement that petitioner made a promise of improved wages to its employees (30a-31a, n. 3) was simply an ingredient of its finding that "no good-faith bargaining impasse had resulted" (31a, n. 3). The Board did not hold that the promise of a wage increase was in itself unlawful. The only violation found by the trial examiner or Board, and the only conduct that the Court of Appeals' decision will prohibit, is the unilateral changing of wages and terms and conditions of employment before bargaining impasse.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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